Office-Supreme Court, U.S.
FILED
JAN 21 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1064

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN McNABB,

Petitioner,

v.

OREGONIAN PUBLISHING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL G. HOLMES*
Spears, Lubersky, Campbell,
Bledsoe, Anderson & Young
520 S.W. Yamhill, Suite 800
Portland, OR 97204
Telephone (503) 226-6151

Attorneys for Respondent

*Counsel of Record

Table of Contents

I. The petition incorrectly portrays the record 1

II. There are not "special and important reasons" to grant a writ (Rule 17.1) 8

III. Conclusion 11

Table of Authorities

Cases

Koch v. Laborico, 66 Or App 78, 674 P2d 602 (1983) 11

New York Times Co. v. Sullivan, 376 US 254 (1964) . . . 6,9

St. Amant v. Thompson, 390 US 727 (1968) 6,9

Rule

Rule 17 of the Rules of the United States Supreme Court . 8,10

I. The petition incorrectly portrays the record.

The petitioner argues a distorted portrayal of the record, in the petitioner's statement of questions presented and elsewhere in the petition.

A. The record shows the following among the undisputed facts. An experienced newspaper reporter conducted an investigation for weeks and composed an article upon this police sergeant's reputation in the black "community." On the allegedly defamatory statements in the article, the reporter had as sources seven independent persons. Each of the sources deposed by petitioner testified that the reporter quoted him accurately. All of the sources were persons of stature and responsibility and were well acquainted with police-black relations in the community. (1) One is a lawyer who has had

years of experience in representing blacks in civil rights matters in Portland, previously as a Legal Aid attorney in the Albina area office, and later in private practice. He had been an attorney for plaintiffs in a suit in which this petitioner and other police officers were charged with using excessive force against blacks, and in which a consent decree was entered against the police. (The reporter also examined the court file of that case.) (2) Another of the sources was a Portland police officer in some of the same years as the petitioner has been, and this source had been one of the police bureau's Community Relations Officers in the subject community (Albina); also he founded the Albina Youth Opportunity School, and was the Director of the Youth Services Division of the City of Portland for several years. When interviewed this source was the Affirmative

Action Officer of the county (Multnomah) and was a member of the Internal Affairs Task Force created by the police commissioner to investigate handling of citizen complaints against police. (3) A third source had been a Portland police sergeant and an immediate supervisor of the petitioner, and for a time was the police bureau's Community Relations Officer in the Albina area. (4) A fourth source had been the Administrative Assistant to the Portland Chief of Police and had served as the police bureau's liaison with the mayor's office. When interviewed he was (and had been for some years) the Deputy Director of the Portland Chapter of the Urban League. (5) A fifth source was then (and had been since 1975) the Chairman of the Greater Northeast Precinct Police Council, an advisory group of citizens and police which met monthly to hear

complaints against police in the precinct including Albina. Also when interviewed he was Deputy Director of Affirmative Action under the Governor of Oregon. (6) A sixth source had been a police officer assigned to the Albina area during some years when the petitioner worked there, and had been a police Community Relations Officer in that area. (7) The seventh source was then (and had been since 1976) the City Commissioner having charge of the Portland Police Bureau.

There is no evidence that the reporter must have doubted the veracity of these persons. In addition to their credentials and experience there is the fact that three of them previously had been reliable sources to the defendant.

The statements that each of those persons made regarding the petitioner corroborated the others. In addition,

the reporter learned other facts that corroborated their statements.

In the reporter's deposition in this case, the reporter identified all sources of the allegedly defamatory statements. Counsel for the petitioner took unrestricted depositions of six of those source persons. (He omitted one of the seven because of ill health.) In the depositions the petitioner's counsel obtained at length from each of them the source person's description of the interviews with the reporter. The Oregon shield law did not prevent the petitioner from obtaining testimony from the sources on what the reporter asked or said and what they told the reporter.

B. The petition is misleading also in what it claims for evidence presented by petitioner or in suggesting that the petitioner's evidence should be deemed

legally sufficient (petition pages i-ii and 8-10). First, it must be remembered that the law does not permit an inference of actual malice from factual error (falsity), or from defamatory content of statements, or from a combination of those elements. E.g., New York Times Co. v. Sullivan, 376 US 254, 272-273, 288 (1964). Second, actual malice is not shown by proof that a defendant failed to investigate or failed to investigate far enough to discover "the truth." E.g., St. Amant v. Thompson, 390 US 727, 730, 731, 733 (1968); New York Times Co. v. Sullivan, supra, 376 US at 260, 261, 287-288. Third, the petitioner's descriptions of his evidence are exaggerated. For example, the deposition of source John Roe did not show that the "defendant possessed definite information . . . that the contents of its publication were false" (petition page 9).

Roe explained in his deposition that his answer to the reporter's question of whether he thought the petitioner was a racist was, "I don't have the information. 'I don't know whether he is or not,' is what it should have been. As far as I know, no." (John Roe Deposition at 34.) For another example, the petitioner's evidence did not show that anything signalled to the reporter a possibility that source Bob Phillips spoke of an officer other than the petitioner, because there was no evidence that the reporter knew that a part of Phillips' description did not fit the petitioner (if it did not fit). The court of appeals concisely disposed of the petitioner's defective assertion. Compare petition page 9 with petition appendix page 14a. Another example is that the petition wrongly avers that

the reporter made no attempt to question the petitioner's immediate supervisors (petition page ii). The record is clear that the reporter interviewed John Roe, who was an immediate supervisor of the petitioner. In addition the reporter interviewed the chief of police and the police commissioner.

II. <u>There are not "special and important" reasons to grant a writ (Rule 17.1).</u>

The Oregon Circuit Court and Court of Appeals decided on a conventional ground that the defendant is entitled to summary judgment. They applied the Oregon law on summary judgments, and determined that the petitioner had not presented specific facts sufficient to show a genuine issue of material fact on his assertion that defendant knew its publication was

false or published in reckless disregard of whether the publication was false. (Pages 4a-5a and 11a-15a of the appendix to the petition. The circuit court granted summary judgment on additional grounds, which the court of appeals did not need to reach.) The decisions below are consistent with St. Amant v. Thompson, 390 US 727 (1968), and New York Times Co. v. Sullivan, 376 US 254 (1964). Indeed, here the ruling for defendant was more strongly compelled, because the reporter investigated impressively. There was no investigation in St. Amant, supra, 390 US at 730, 733, or New York Times, supra, 376 US at 261, 288, and nevertheless the Court held that judgments must be entered for the defendants. Thus, in this case the court of appeals did not decide an important question of federal law which has not been decided

by this Court, and the decision of the court of appeals did not conflict with a decision of this Court or a federal court of appeals (Rule 17, Rules of the United States Supreme Court).

The petition fabricates and errs in arguing that the Oregon courts "have made summary judgment the rule . . . where actual malice is the question. . . ." (petition page 21). Obviously, the courts below did not hold or declare that summary judgment is "the rule" in actual malice suits. Furthermore, inconsistently with the petitioner's argument here, he argued to the Oregon Supreme Court (when he unsuccessfully applied for review) that the decision against him conflicted with a 1983 Oregon Court of Appeals decision which reversed a summary judgment against a plaintiff police officer in a libel suit, upon perceiving a genuine issue of

fact on actual malice (Koch v. Laborico, 66 Or App 78, 674 P2d 602 (1983), review denied 296 Or 712 (1984)). It is evident that different facts produced different results, and the Oregon Court of Appeals has not made summary judgment "the rule" in actual malice suits. In the present case the court of appeals decision is prosaic and does not have the doctrinaire character that the petition would ascribe to it.

III. Conclusion.

There are neither important nor suitable reasons for this Court to undertake review of the ordinary decision of the court of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael G. Holmes,
Counsel for Respondent

(Respondent is a corporation owned either directly or through intermediate corporations by Advance Publications, Inc.)